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BOOK REVIEWS

THE CONFLICT OF LAWS, A COMPARATIVE STUDY. VOL. 3. (Special Obligations: Modification and Discharge of Obligations). By Ernst Rabel. Chicago: Callaghan & Company, 1950. Pp. xlvi, 611. \$12.50.

This is the third volume of Dr. Rabel's exhaustive study of *Comparative Conflict of Laws*. The earlier volumes have been widely acclaimed.¹ As Professor Dean has said, Rabel's work when completed, will be the "most comprehensive study of the Conflict of Laws in English."² The author has undertaken to examine the Conflict of Laws throughout the world in the light of comparative law principles. For the average American lawyer, Comparative Law is a closed book which he seemingly has no immediate need to open. Yet we do not have to be "internationalists" to realize that the second half of the present century is likely to be one in which legal systems in their entirety will be subjected to increasing criticism as a result of what comparative law studies such as Dr. Rabel's reveal. Some have predicted that we are on the verge of a golden age of Comparative Law. So far as the Conflict of Laws is concerned, the American lawyer who might believe that "things in general were settled forever" by the blackletter of the Restatement will be shaken when he reads Dr. Rabel's volumes. They constitute a sort of cold shower and rough toweling for narrow legal provincialism or nationalism. "Contrast with another legal system may reveal new values. This is one of the merits of the comparative method. Foreign law serves as a searchlight to bring out beauty and blot alike. It makes us aware not only of defects but also of hidden virtues."³

The present volume carries into the field of special types of obligations the critical theories advanced in the earlier volumes. Its method is the same and its scope can be appreciated from a brief sampling of the topics treated: Money Loans and Deposits, Sales of Movables and Immovables, Agency, Maritime Transportation of Goods, Insurance and Suretyship. The volume concludes with chapters on the Modification and Discharge of Obligations, including a discussion of the Statute of Limitations. The author again admirably succeeds in avoiding a mere compilation or encyclopedic recapitulation of the conflicts rules of the various legal systems. He does not hesitate to give his scholarly estimate of the relative values or merits of the competing rules. At times, however, the wealth of material to be presented in such limited space does not permit such extensive criticism as that given, for example, to the various conflicts theories regarding the Statute of Limitations.

The key to Dr. Rabel's critical approach has been given in his earlier volume⁴ and appears in the Introductory Note to the present volume:

"Among the multitude of conflicts principles that, according to various claims, should determine the law applicable to all contracts, only two have resisted

1. 1 RABEL, CONFLICT OF LAWS (1945); 2 RABEL, CONFLICT OF LAWS (1947). See Book Reviews: Falconbridge, 25 CAN. B. REV. 318 (1947); Gutteridge, 63 L. Q. REV. 112 (1947); Holt, 35 CALIF. L. REV. 611 (1947); Putnam, 21 N. Y. U. L. Q. REV. 563 (1946); Rheinstejn, 14 U. OF CHI. L. REV. 124 (1946); Dean, 17 FORD. L. REV. 306 (1948); McChesney, 62 HARV. L. REV. 531 (1948); Griswold, 57 YALE L. J. 1437 (1948); Cheatham, 48 COL. L. REV. 1267 (1948).

2. 17 FORD. L. REV. 306 (1948).

3. EDER, A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW, (1950).

4. 2 RABEL, CONFLICT OF LAWS, 480-4 (1947).

the test of critical analysis. These, indeed form an adequate groundwork. First, the freedom of parties to choose the law applicable to their contract must be recognized as a general rule without petty restraint. Second, in the absence of such agreement, a contract should be governed by the law most closely connected with its characteristic feature."⁵

Dr. Rabel is no friend of the "scholastic doctrine" which "may invest the law of the place of contracting with ineluctable force."⁶ His analysis of Continental law and decisions and his criticism of American cases which seem to apply rather mechanically the *lex loci contractus* rule provide the reflective reader with adequate data on which to estimate the value of the "autonomy" theory. However hardened we may be in allegiance to the Bealist-Restatement *lex loci contractus* rule, it must be admitted that "the question of what law determines the validity of a contract . . . is the most confused subject in the field of Conflict of Laws."⁷ If the *lex loci contractus* rule disguises or conceals in fact a latent but very real choice by the court of the "intention" rule, it is time that we stripped off the disguise and considered where a frank adoption of the "intention" theory must lead us. The various chapters on specific contract obligations in Dr. Rabel's present volume, particularly those dealing with money loans and deposits will help in making that estimate.

The reviewer must resist the temptation to discuss the topics of the present volume in detail. However, the short chapter on the Sale of Immovables and the chapters on the Statute of Limitations illustrate the excellence of the author's method and the cogency of his critique. Perhaps the average reader will find these chapters most familiar and hence most interesting. The famous Holmesian limitation on the *lex situs* rule with reference to contracts to convey land in another state is applauded and the troublesome question with regard to the governing law in reference to covenants for title is carefully discussed.⁸ The author's excursus into the nature of covenants running with the land in Anglo-American law should excite the real property man.⁹ For here again is the ancient controversy between logic and history.

Is the Statute of Limitations a matter of "procedure" and hence to be governed by the *lex fori* or a matter of "substance" and thus governed by the *lex contractus*. "Must we go again over all this territory?"¹⁰ asks Dr. Rabel; but he resigns himself to the task. He traces the history of the rule that the matter is one appertaining to the "remedy," and shows by his careful study of the concept of limitations in other legal systems that analytically, much better reasons exist for the "substantive" view.¹¹ And to this reviewer it still seems unnecessary, in arriving at such a

10. *Id.* at 476.

11. *Id.* at 493.

conclusion, to call in aid the "realists" who affect to see in the lawyer's distinction between matters of "substance" and matters of "remedy" nothing but a "nominalist" sham-battle.

Dr. Rabel's work is unquestionably a contribution of major importance. It must be consulted constantly by every careful student of the Conflict of Laws. It has succeeded in pointing out defects in our American rules in this field. The compara-

5. P. vii.

6. *Ibid.*

7. GOODRICH, CONFLICT OF LAWS 321 (3d ed. 1949).

8. *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737 (1897).

9. 3 RABEL, CONFLICT OF LAWS 110 (1950).

tive method, however, though it may reveal on purely analytical grounds that other systems of law have arrived at rules seemingly superior to our own, does not disclose how far and in what manner we may go about the substitution of those "superior" rules for our "inferior" ones. If law is the product of history as well as of logic, history cannot always yield to logic. The delicate task of grafting upon the body of our law new rules approved in systems whose history differs from our own remains after the scholar in Comparative Law has done his work.

EDWARD F. BARRETT†

THE NEW YORK LAW OF LANDLORD AND TENANT AND SUMMARY PROCEEDINGS. Two volumes. By Joseph Rasch. New York: Baker, Voorhis & Company, 1950. Pp. cxxv, 794; xxv, 1615. \$25.00.

Despite anything in this review suggestive of the contrary, this is a fine piece of work. The author is thoroughly conversant with his subject and has done a commendable job of research, correlation and exposition. And certainly his treatment is comprehensive.

The first volume deals essentially with the substantive law of landlord and tenant while the second is concerned primarily with summary proceedings. The book is divided into five parts. The author first discusses the tenant's remedies to acquire initial possession of the demised premises, assignment and subletting, holdovers, renewals and licenses. In part two are treated rent, deposits, taxes and water rights, use and waste, alterations, signs, restrictions, fixtures, improvements, repairs, options to purchase and insurance. The third part takes up the problems of conditions and conditional limitations; termination by summary proceedings, eminent domain, destruction and surrender; the covenant of quiet enjoyment and eviction. In part four the reader is led through the formalities of leasing. Part five treats in detail summary proceedings, the statutory grounds therefor, the problems concerned with parties, venue, and matters of practice from petition to redemption. There are approximately 1500 pages of text supplemented by some 350 pages devoted to tables of contents, statutes, cases cited and an index of 189 pages. One hundred forms are included, covering pertinent clauses to leases, notices and pleadings in summary proceedings.

Accepting the author's statement in his preface that the book was written for the practitioner, one must conclude that Mr. Rasch takes a dim view of the intellectual capacity of his colleagues at the bar. For what the author has to say, he says three times. The pattern of exposition evident in most of the book but particularly in those parts devoted to the substantive law is this: a statement of the rule; quotations from cases stating the rule; a summary of the rule. While this, like all repetition, can at times become mildly irritating, it does have the ultimate effect of leaving the reader in no doubt as to the point the author is making. Ambiguity is reduced to a minimum and whatever the reaction of the practitioner, the law student will be appreciative.

The author has his own ideas on organization. Thus the difference between a lease and a license is not treated until Chapter 5, and tenancies other than estates for years are postponed until the discussion of summary proceedings in Chapter 23. A spot check of the index, however, indicates that it is quite good and the reader should have no difficulty locating his topic.

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The main target of criticism in the book would seem to be the occasional inaccurate statement which may tend to mislead. Examples of this are such declarations as "it must be emphasized that a tenant is under an implied obligation to put, and to keep, demised premises in tenantable repair";¹ "when a tenant restores his possession to the landlord, and consents to the landlord's reletting of the premises to another, it has been held that these facts indicate a surrender and acceptance";² and, "in law there is only one way in which this election [to terminate a tenancy for breach of condition subsequent] can be manifested. That is, by actual reentry."³ The author knows better and a complete reading of the subject involved will dispel any misapprehension but if the book is used only for reference, a limited reading may be dangerous. Other statements may be misleading because they are too general. For example, the statement of the measure of damages for breach of the landlord's restrictive covenant;⁴ and on the right to recover for property damage on breach of the landlord's covenant to repair.⁵ In § 1474⁶ we find the anomalous assertion of a duty to exercise reasonable care coupled with liability only for wilful or malicious damage. And in § 719,⁷ a statement on the effect of a non-waiver clause is confusing because of a failure to include the prerequisite of notice to the tenant.

On the other hand, the author treats particularly well the difficult subjects of the respective liabilities of assignor and assignee, fixtures, conditional limitations, and remedies for breach of the landlord's covenant to renew.

With the admonition, then, that the researcher read extensively on his problem and not be content with any single statement appearing in one of the brief paragraphs into which the book is divided, the work can be recommended as an exceedingly useful tool in a field where such aids are not in superabundance. One final word of caution, however, is in order. An advertising throw-away of the publisher speaks of "its clear-cut discussion of the court-established principles applying to ALL emergency rent situations. . . ." If this suggests to the reader that Mr. Rasch has covered the emergency rent law, the suggestion is false. The general nature of a statutory tenancy has been indicated but the author expressly disclaims any attempt to treat the emergency laws because of their transient nature.

THOMAS J. SNEE†

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1. P. 475.
 2. P. 648.
 3. P. 809.
 4. Section 428, P. 381.
 5. Section 530, P. 453.
 6. Section 1474, P. 1231.
 7. Section 719, P. 585.

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